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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 374

THE TIMES-PICAYUNE PUBLISHING COMPANY, L. K. NICHOLSON, JOHN F. TIMS, JR., ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
The questions are substantial	8
Appendix "A"—The opinion, findings of fact, conclusions of law and final judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division	13

Table of Cases Cited

Alexander Milburn Co. v. *Union Carbide and Carbon Corp.*, 15 F. 2d 678, 273 U.S. 757	10
Federal Trade Commission v. *Gratz*, 253 U.S. 421	10
Federal Trade Commission v. *Sinclair Co.*, 261 U.S. 463	10
International Salt Company v. *United States*, 332 U.S. 392	9
Prairie Farmer Publishing Co. v. *Indiana Farmers' Guide Publishing Co.*, 88 F. 2d 979, 301 U.S. 696	10
Standard Oil Company (Calif.) v. *United States*, 337 U.S. 293	9
Terminal Railroad Association v. *United States*, 266 U.S. 17	2
United States v. *Line Material Co.*, 333 U. S. 287	2
United States v. *Paramount Pictures*, 334 U.S. 131	9
United States v. *United States Gypsum Co.*, 333 U.S. 364	2

Statutes and Other Authorities Cited

	Page
Act of July 2, 1890, Sections 1, 2 and 4 (26 Stat. 209, as amended) (15 U.S.C. 1, 2 and 4) (The Sherman Anti-Trust Act)	3
Clayton Act, Section 3	9
Expediting Act of February 11, 1903, Section 2 (32 Stat. 823)	2
United States Code, Title 15, Section 29, as amended by Section 17 of the Act of June 25, 1948 (62 Stat. 989)	2

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STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on July 1, 1952. A petition for appeal is presented to the District Court herewith, to-wit: on July 30th, 1952.

Opinion Below

The opinion of the District Court for the Eastern District of Louisiana is unreported. A copy of the opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix "A".

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *United States* v. *Line Material Co.*, 333 U. S. 287 (1948); *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948); *Terminal Railroad Association* v. *United States*, 266 U. S. 17 (1924).

Questions Presented

Defendant-appellant, The Times-Picayune Publishing Company, a daily newspaper publishing company serving the New Orleans area, publishes from one plant The Times-Picayune in the morning, the New Orleans States in the evening, and The Times-Picayune-New Orleans States on Sunday. Advertisers desiring to place either classified advertising or general (national) advertising with The Times-Picayune Publishing Company for insertion on a day other than Sunday can do so only by contracting to run the advertisement in both The Times-Picayune and the New Orleans States. The primary questions presented are: [1]

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[1] All the points raised in the Assignment of Errors are also presented. The Questions Presented stated above set forth the basic issues.

(1) Whether the contracts for the sale of classified advertising space are contracts in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

(2) Whether the contracts for the sale of general advertising space are contracts in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

(3) Whether the promulgation and use of the contracts for the sale of classified and general advertising space amounted to an attempt to monopolize in violation of Section 2 of the Sherman Act.

Statute Involved

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1; 2 and 4) commonly known as the Sherman Act are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Statement

The United States filed a civil action against The Times-Picayune Publishing Company (hereinafter referred to as the "Publishing Company") and four of its officers and employees under the provisions of Section 4 of the Sherman Act, charging them with violating Sections 1 and 2 of the Act. Insofar as is now pertinent, the complaint alleged that (a) the Publishing Company had entered into contracts in unreasonable restraint of trade in newspapers, news, advertising, supplies and nationally advertised products in violation of Section 1 of the Act and (b) all of the defendants had engaged in an attempt to monopolize interstate commerce in newspapers and the dissemination of news and advertising in violation of Section 2 of the Act.[2] The United States filed a motion for a partial summary judgment with respect to the alleged violation of Section 1, which motion was heard and denied by the District Court. Thereafter on April 30, 1951, the cause came on for hearing on its merits and on May 26, 1952, the District Court filed an opinion holding that the classified advertising contracts and general or national advertising contracts entered into by the Publishing Company were contracts in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act and that the Publishing Company by entering into such contracts had attempted to monopolize trade and commerce in violation of Section 2 of the Act. It also concluded that three of the four individual defendants had violated Sections 1 and 2 of the Act by forming and effectuating on behalf of the Publishing Company the contracts in question.

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[2] The complaint also charged the defendants with combining and conspiring both to restrain and to monopolize trade and commerce in newspapers, etc. However, in the course of the trial the United States abandoned these charges.

The salient facts are not in substantial dispute. Prior to 1933 the Publishing Company published a daily newspaper (including Sunday) called The Times-Picayune, which was circulated in the New Orleans area in the morning. A competitor, The Item Company, Ltd., also engaged in the daily newspaper publishing business, published The Morning Tribune circulated in the morning, The Item circulated in the evening and The Item-Tribune circulated on Sunday. Another competitor, The Daily States Publishing Company, Ltd., published the New Orleans States circulated daily in the evening and on Sunday. In 1933, the Publishing Company purchased the name, goodwill, circulation and advertising, features and news contracts of The Daily States Publishing Company, Ltd. Since that time the Publishing Company has published in its own plant the New Orleans States and has circulated it daily in the evening. Thereafter the Sunday publication of the Publishing Company was called The Times-Picayune-New Orleans States.

At the present time, daily (exclusive of Sunday), the Publishing Company publishes The Times-Picayune, having a circulation of approximately 180,000 in the morning, and the New Orleans States, having a circulation of approximately 100,000 in the evening. The only other daily newspaper published in New Orleans is The Item, having a circulation of approximately 100,000 in the evening. The District Court held that The Times-Picayune, having the largest circulation and being the only newspaper circulated in the morning, is the "dominant" newspaper in New Orleans.

The Publishing Company sells space to classified advertisers and to general (national) advertisers in The Times-Picayune and the New Orleans States as a unit and refuses to sell such advertisers space in one or the other separately. Such a rate structure is commonly called the unit combina-

tion rate and is sometimes referred to as the "forced combination" rate.

From 1924 until 1941 (when publication of The Morning Tribune was discontinued) the Publishing Company's local newspaper competitor, The Item Company, Ltd., sold classified advertising in The Morning Tribune (morning) and The Item (evening) at the unit combination rate only. In 1935 the Publishing Company likewise adopted the unit combination rate for the sale of classified advertising in The Times-Picayune and the New Orleans States. At the time that the Publishing Company adopted the unit rate structure for classified advertising a large number of other newspaper publishing companies publishing both morning and evening had the same type of rate structure for classified advertising. As a result of adopting the unit combination rate for classified advertising, the classified advertising carried in The Times-Picayune and in the New Orleans States was equalized, whereas prior to the adoption of the unit rate the New Orleans States carried less than one-half as much classified advertising as was carried in The Times-Picayune.

Although the classified advertising lineage appearing both in The Item and in The Times-Picayune and the New Orleans States has increased over the years, the District Court found that the spread between the lineage appearing in The Times-Picayune and the New Orleans States and that appearing in The Item had steadily increased.[3] The Court further found that the major portion of the increase resulted from the use of the compulsory unit rate, that as the result of that rate many classified advertisers were required to purchase space in the States which they did not want and that some of those advertisers would have placed

[3] Percentagewise, the Item showed a greater increase than the combination during the period immediately preceding the institution of this suit.

advertising in The Item except for the compulsory unit rate. The Court concluded that the contracts embodying the unit combination rate for classified advertising placed with the Publishing Company were contracts in unreasonable restraint of trade and should be enjoined because in violation of Section 1 of the Sherman Act.

Effective as of February 1, 1950, the Publishing Company issued a new general rate card for general (national) advertising which put into effect a unit combination rate for all general advertising placed with the Publishing Company for publication daily except Sunday. After the effective date of the rate card the Publishing Company would only contract to accept general advertising for insertion in both The Times-Picayune and the New Orleans States. At the time that the Publishing Company adopted this rate structure for general advertising approximately 180 newspaper publishers constituting the vast majority of publishers publishing both morning and evening had in effect the same type of rate structure.

The District Court found that prior to the adoption of the unit combination rate for general advertising The Times-Picayune had carried in excess of 50% more general advertising than either the States or The Item. Following the adoption of the unit combination rate the general advertising lineage in the States became the same as that in The Times-Picayune. The Court found that some advertisers increased their general advertising lineage in the States or commenced advertising in the States involuntarily as a result of the unit combination rate. It also found that the unit combination rate caused some advertisers to purchase space in the States which they would have otherwise have purchased in The Item. The Court concluded that unit combination rates for general advertising resulted in contracts in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

The District Court also held that the Publishing Company violated Section 2 of the Sherman Act by engaging in an attempt to monopolize and that the individual defendants-appellants were likewise in violation of Section 1 and 2 of the Act by forming and effectuating on behalf of the Publishing Company the classified advertising contracts and general advertising contracts. The Government charged a number of acts in addition to the adoption of the unit combination rate for classified and general advertising as evidencing a course of conduct establishing an attempt to monopolize. These other charges were either abandoned in the course of the trial or ruled upon adversely to the United States by the District Court. Consequently, the sole basis for the holding of the District Court that the defendants have engaged in an attempt to monopolize is the fact that in 1935 the unit combination rate was adopted for classification advertising and in 1950 the unit combination rate was adopted for general advertising. It was apparently the Court's conclusion that since in each instance the unit combination rate enabled the Publishing Company to acquire some advertising which would otherwise have been acquired by its competitor, this amounted to an attempt to monopolize.

The Questions Are Substantial

1. The issues involved in this appeal are of general public importance. The practice of offering unit combination rates only to classified and general advertisers has been a common practice in the newspaper industry for more than forty years. At the time that the Publishing Company inaugurated the unit rate for classified advertising the only competing newspaper publisher in New Orleans had had such a rate for more than ten years and a large number of other publishers publishing morning and evening were using the same type of rate structure. When the unit

combination rate for general advertising was announced by the Publishing Company in 1949, approximately 180 newspaper publishers, substantially all newspaper publishers publishing morning and evening, were using unit combination rates. The decision of the District Court casts grave doubts on the legality of the rate structure of all newspaper publishers who follow this generally accepted practice. If they are forced to abandon the practice there will be a very grave economic impact upon a major segment of the newspaper industry and the advertising public.

2. The fundamental question presented by this appeal is one which has not been squarely passed upon by the Supreme Court. The District Court, holding that the defendants had violated Section 1 of the Sherman Act, stated in its opinion:

> "Publishing, as it does, two separate and distinct newspapers, the defendant corporation's general and classified advertising contracts which compel an advertiser in one of its newspapers to contract for an equal amount of space in its other newspaper, effect tying-in sales."

In holding such tying agreements to be illegal it appears that the District Court relied primarily upon *Standard Oil Company (Calif.)* v. *United States*, 337 U. S. 293 (1949). However, that case held that the agreement there in question violated Section 3 of the Clayton Act and the Supreme Court specifically refused to rule on the question whether such agreements also violated Section 1 of the Sherman Act. The case at bar does not involve tying agreements on patented and unpatented articles. (cf., *International Salt Company* v. *United States*, 332 U. S. 392 (1947)) or tying agreements covering two or more copyrights, (*cf.*, *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948)). If the Publishing Company is to be regarded as publishing two separate and distinct newspapers the most that can be

said is that it exercised its individual right, unaided by patents or copyrights, to sell advertising space in those newspapers on condition that the advertiser place his advertising in both newspapers. We know of no decision of the Supreme Court holding that in such circumstances a single trader is guilty of making an illegal advertising agreement because he chooses to sell his entire daily production as a unit and declines to offer the component parts separately.

3. Assuming *arguendo* that the Publishing Company's rate structure is to be viewed as resulting in a tying agreement, we submit that such an agreement is lawful under the controlling decisions of the Supreme Court. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 (1920) involved the sale of unpatented steel ties used for binding bales of cotton and jute bagging used for wrapping bales of cotton in combination. There the respondents who were the sales agents of the manufacturers of those products refused to sell either item separately. Many merchants, jobbers and dealers were frequently unable to procure ties from any other firm and hence were required to buy the combination. The Supreme Court in upholding the right of the respondents to sell their products in combination said (at p. 528):

> "If the real competition is to continue, the right of the individual to exercse reasonable discretion in respect of his own business methods must be preserved."

See also *Federal Trade Commission* v. *Sinclair Co.*, 261 U. S. 463 (1923); *Alexander Milburn Co.* v. *Union Carbide and Carbon Corp.*, 15 F. 2d 678 (C. C. A. 4, 1926), cert. den. 273 U. S. 757; *Prairie Farmer Publishing Co.* v. *Indiana Farmers' Guide Publishing Co.*, 88 F. 2d 979 (C. C. A. 7, 1937); cert. den. 301 U. S. 696.

4. Finally, it is submitted that the District Court reached an erroneous result because it misconceived the true nature of the issues presented. The District Court has held that

since the Publishing Company, which is engaged solely in the newspaper publishing business, chooses to publish under the name of The Times-Picayune in the morning and under the name of the New Orleans States in the evening, it is publishing two newspapers. The decree deprives it of the right to sell the combined circulation to advertisers as a unit on a weekday in the same manner as it does on Sunday. The result is that the Publishing Company is forbidden to make the most economic use of its facilities.

A publisher to utilize his facilities on a 24-hour basis may publish around-the-clock under one masthead and with one set of features or he may, as in the instant case, conclude that greater coverage of the reading public can be obtained by publishing at different times under different mastheads and with different features. In either event his objective, from the point of view of selling advertising, is maximum coverage of the reading public in the particular market through maximum use of his publishing facilities. Conceding *arguendo* that what the subscriber buys in the morning is different from what he buys in the evening it is erroneous to conclude that the same is true of the advertiser. What the advertiser buys is the opportunity of reaching a certain volume of readers. As a private enterprise it is solely the concern of the Publishing Company as to whether it shall offer to advertisers its entire volume of readers as a unit or subdivide its volume of readers to satisfy the wishes of a limited number of its advertising customers.

We submit that the lower Court, in weighing the reasonableness of the restraint, gave insufficient consideration to the economic justification which caused the defendant corporation to institute the unit rate in the interest of greater efficiency and lower cost to the advertisers, the majority of whom prefer to buy in combination. Such increased efficiency and lower cost enables the defendant corporation

to compete with other newspapers, locally and nationally, and with other media of competition, locally and nationally, thus promoting competition in a way in which the denial to the defendant corporation of its rights to utilize its plant to full capacity would stifle competiton.

No decison of the Supreme Court has held, either in fact or by inference, that a tie-in agreement is void and in unreasonable restraint of trade in any case remotely resembling the facts and circumstances of the instant case, which involves the peculiar and unusual business of a newspaper, obtaining and dealing as it does with subscribers on one basis and for one economic purpose and obtaining and dealing with advertisers on a different basis and for a different economic purpose.

By the decision in this case the District Court has ruled that the Publishing Company, in choosing to offer only its entire volume of readers as a unit to classified and general advertisers, has entered into contracts in restraint of trade in violation of Section 1 of the Sherman Act. Having so held, the District Court concluded that the defendants-appellants in promulgating and using the unlawful contracts had attempted to monopolize the newspaper business in the New Orleans area. This ruling is made despite the fact that the District Court's opinion clearly indicates that there was no specific intent to monopolize. It is clear that any holding that the defendants atempted to monopolize is erroneous and must fall if the unit combination rate contracts are valid under Section 1 of the Sherman Act.

Respectfully submitted,

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JAMES C. WILSON,
Counsel for Defendants-Appellants.

APPENDIX "A"

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Civil Action No. 2797

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE TIMES-PICAYUNE PUBLISHING COMPANY, L. K. NICHOLSON, JOHN F. TIMS, JR., AUBREY F. MURRAY and DONALD W. COLEMAN, *Defendants*

OPINION—Filed May 27, 1952

CHRISTENBERRY, *J.*:

This is an action filed by the United States under Section 4 of the Sherman Act, against the Times-Picayune Publishing Company, a Louisiana Corporation, which publishes the Times-Picayune (morning), the New Orleans States (evening), and the Times-Picayune and States (Sunday), L. K. Nicholson, its President, John F. Tims, its Vice-President and General Manager, Aubrey F. Murray, its Advertising Director, and Donald W. Coleman, its Circulating Manager.

The complaint alleges that (a) the defendant corporation has entered into and is a party to contracts with advertisers in unreasonable restraint of trade in newspapers, news, advertising, supplies and nationally advertised products in violation of Section 1 of the Act; (b) all of the defendants are combining and conspiring in unreasonable restraint of the aforesaid trade also in violation of Section 1 of the Act; and (c) all of the defendants are combining and conspiring to monopolize, and are attempting to monopolize, the dissemination of news and advertising through newspaper channels, in violation of Section 2 of the Act.

The complaint seeks equitable relief to prevent the defendants from continuing to utilize the allegedly unlawful advertising contracts, and from engaging in other practices

alleged to be restraining the trade of their only newspaper competitor in New Orleans, and preventing advertisers from freely selecting a medium for their evening newspaper advertising in New Orleans.

The answer of the defendants admitted some of the allegations of fact, but denied that any violations of law had been committed.

Although the Government undertook to support all of the charges, in its brief filed at the close of the trial the Government urged only the charges that the defendants have contracted in restraint of trade, and have attempted to monopolize trade in violation of Sections 1 and 2 of the Sherman Act. The allegations that defendants conspired among themselves in violation of Sections 1 and 2 of the Act were not urged, and must be considered as having been abandoned.

The Times-Picayune Publishing Company has published in New Orleans continuously since prior to 1933, a morning and Sunday newspaper (known in the morning as the Times-Picayune, and on Sunday since 1933 as the Times-Picayune-States), which is in general circulation in the city of New Orleans and elsewhere in the State of Louisiana, and in other states of the United States.

During the period from July, 1941, until March, 1950, the Company published and distributed and sold the only Sunday newspaper published in New Orleans.

The States was formerly published as an evening newspaper by the Daily States Publishing Company, Ltd. On July 17, 1933, the Times-Picayune Publishing Company purchased from the Daily States Publishing Company, Ltd., the name, good will, and circulation of the newspaper known as the New Orleans States, its contracts with advertisers, and also its contracts and rights to be furnished news, features and comics. The contract of purchase provided that the vendors would not engage in the newspaper publishing business in the New Orleans area for a period of ten years thereafter; that the vendors would not for a period of nine months thereafter sell any part of their machinery or equipment to any purchaser located in the New Orleans area, and that in any sale of any part of the machinery or equipment

to any person, there should be included an agreement on the part of said purchaser that the machinery or equipment would not be used by it or its assigns in the New Orleans area within nine months from the date of the contract; and that the vendors for a period of nine months would not sell any part of the machinery or equipment without first offering it to the defendant corporation. Since said purchase, the Company has published the States as an evening newspaper of general circulation in New Orleans and elsewhere in the State of Louisiana, and in other states of the United States.

The New Orleans Item is a newspaper of general circulation published in the evening, Monday through Friday, with a Sunday edition which comes out on Saturday. The New Orleans Item competes with the newspapers published by The Times-Picayune Publishing Company. It is published in New Orleans, and has a circulation in New Orleans and elsewhere in the State of Louisiana and in other states of the United States.

The Times-Picayune, States and Item are the only significant media of news, advertising and other information disseminated regularly for residents of New Orleans through publication and circulation of newspapers.

The Times-Picayune and the States Are Separate Newspapers

The defendants asserted in their answer, and contended throughout the trial, that the Times-Picayune, the States and the Times-Picayune-States are editions of a single newspaper published by The Times-Picayune Publishing Company. However, the evidence establishes beyond question that the defendant corporation publishes two separate and distinct newspapers, consisting of the Times-Picayune, morning and Sunday, the Sunday edition being called "The Times-Picayune-States", and the States, evening. These newspapers are separate and distinct and have always been considered so by defendants. They reach separate groups of readers; are produced at least in part by separate organizations; and have separate news and feature content. Although the editorial policy is identical, the editorial content

is different. The two newspapers have an entirely different and distinctive make-up and appearance.

On three occasions in 1939 the managers of general advertising for the Company, Mr. Roland Ladreyt, wrote to national advertisers stating that "entirely separate organizations" "produced" the Times-Picayune and the States. In two of these letters he pointed out that the Times-Picayune and the States each has its own complete staff, including editor, managing editor, city editor, reporters, and photographers; that there is actually competition in the respective departments for "breaking first with outstanding events"; that the circulation departments are on a competitive basis; and that the retail advertising staffs are separate. He stated further the makeup of the States and the Times-Picayune is as different as the New York Times and the New York Journal American, and also that more than 35,000 families in New Orleans subscribed to the New Orleans States which did not have the Times-Picayune weekday delivered to their homes. All of the representations made by the manager of general advertising in these letters are borne out by the evidence, including the testimony of the defendant Tims, and that of Mr. George Healy, Vice-President of the defendant corporation, and Managing Editor of the Times-Picayune.

The Times-Picayune and States contain different features, syndicated columns, editorial cartoons, comics, and news. Separate contracts with the Associated Press and feature syndicates were signed by the defendant corporation for the Times-Picayune, and for the States. In each of those contracts which concerned the States that publication was referred to as "a newspaper."

The audits of the Company's books and records for the years 1947 to 1949, prepared by Haskins and Sells, Certified Public Accountants, show an allocation of revenues and expenses as between the Times-Picayune and the States, and these allocations were accepted by the accounting firm as they appeared on the books and records of the Company.

The statements rendered by the Company for advertising and the letterheads of the Company refer to the Times-Picayune as being issued "every morning and Sunday",

and the States as being "issued every evening except Sunday".

The defendant corporation, over the notarized signatures of defendants Tims and Coleman, submits to the Audit Bureau of Circulation separate statements for the Times-Picayune, morning and Sunday, and the States, evening.

In testifying before the War Production Board in 1944, the defendant Tims stated that when the Company bought the New Orleans States in 1933, it elected to keep it as a separate newspaper.

In the Times-Picayune of January 25, 1937, there appeared an historical account of the defendant corporation's operations, and in referring to the States the account stated:

> "In 1933 the Times-Picayune Publishing Company bought the New Orleans States. The Sunday States was merged with the Times-Picayune. The week-day States continued its separate existence."

In an announcement in the Times-Picayune of July 18, 1933, the former owner of the States stated, "Under the terms of the sale, the New Orleans States will continue to be published as a six-day newspaper in the afternoon field."

The Times-Picayune's Dominance in New Orleans and in the New Orleans Trading Territory

That the Times-Picayune is the dominant newspaper of New Orleans and its trading territory, there can be no doubt. It is the only morning newspaper of general daily circulation published in New Orleans, and there are no other daily morning newspapers circulated in New Orleans which compete with it for local and national advertising in the morning field. In each of the years 1949 and 1950 its circulation was equal to the combined circulation of both the States and the Item. For at least twenty years the Times-Picayune has been the largest newspaper in New Orleans in circulation, advertising lineage, and number of pages published.

The Company has asserted, quite justifiably, that "The Times-Picayune is the dominant newspaper of New Orleans and its trading territory."

The Manager of General Advertising for the defendant corporation, in 1949, wrote that the Times-Picayune is "the back-bone of any advertising effort" in the New Orleans market. That statement is doubtless true.

Enjoying as it does a monopoly position in the morning field, and an enormous advantage in circulation, advertising lineage and number of printed pages, newspaper advertisers who desire to cover the New Orleans market must, of necessity, use The Times-Picayune as a medium for their advertising.

Defendant's Advertising Contracts

Advertising in New Orleans newspapers is commonly divided into three principal categories, namely: Classified, General, sometimes called national, and local display, sometimes called retail.

Classified Advertising

The defendant corporation at all times since March, 1935, has required advertisers using classified advertisements to agree to purchase, and to purchase, such advertisements in The Times-Picayune and The States, as a unit, at combination rates, and has refused to sell such advertising in the morning or evening newspapers separately, except for what is known as "over the river" classified advertising. The "over the river" classified advertising represents such a very small part of the total classified as to be relatively unimportant.

There seems to be no doubt but that the purpose of the unit rate on classified advertising is to increase the lineage of such advertising in The States, and certainly that has been its effect. In 1934, that is to say, one year prior to the adoption of the unit rate on classified advertising, and while The States was under the ownership of the defendant corporation, The States carried less than one-half the number of lines of such advertising carried by The Times-Picayune. By 1936, after one year of the unit rule,

the classified lineage of The States had risen to a par with that of The Times-Picayune. This was inevitable, since in order to obtain lineage in The Times-Picayune it was necessary for a classified advertiser to take a similar amount of lineage in The States. During the ensuing 15 years, up to and including 1950, the spread between the lineage in each of the two newspapers, and that of The Item, steadily increased. As a matter of fact, during the years 1946 through 1950, because of the "over-the-river" classified advertising, which advertising was carried only by The States, The States carried more classified advertising lineage than did The Times-Picayune.

In 1950, classified advertising lineage carried by The Times-Picayune and by The States approximated four and one-half million lines each, or more than double the lines carried by The Item. In 1934 The States carried 35 per cent of the classified advertising lineage in the evening field. By 1950 it carried 68 per cent of such lineage. It is only reasonable to attribute at least a major portion of this increase to the compulsory rate.

A number of classified advertisers testified that The Times-Picayune is their first selection as an advertising medium in New Orleans. Four of them testified that The Item is their second choice. Three such advertisers testified that budget limitations require them to place only a limited amount of advertising in newspapers in New Orleans. Two testified that they would place advertising lineage in The Item if the unit rule were not in effect. There was evidence that at least three advertisers increased their advertising lineage in The States, or added The States to their schedule involuntarily, as a result of the unit rule. The unit rule is not followed with respect to local display advertisers, and the explanation was made by the Manager of General Advertising of the Company, that it would be an imposition on retail advertisers to have a unit rate for them, "because the retail advertisers gear their advertising to produce immediate over-the-counter results; and an advertiser/. . . may be sold out by 11 o'clock in the morning." It is proper to mention here that many retailers use classified advertising, and why it would be an imposi-

tion to exact a unit rate for local display advertising, and is not for classified, was not explained. It seems clear beyond question that many classified advertisers are required to purchase what they do not want, namely, space in The States.

General Advertising

From 1933 to 1940, general advertisers were afforded an opportunity to purchase advertising space in the Times-Picayune and the States separately, but were given the benefit of an optional combination rate for advertisements carried in both papers, the combination rate being lower than the sum of the individual rates for each newspaper.

The unit rate for national advertising was first adopted by the defendant corporation on June 1, 1940. It was optional and continued in effect, with some changes in details, for ten years. Under this arrangement, the Company required advertisers, in order to obtain a reduced rate on general advertising in excess of 10,000 lines in its daily papers, to contract to purchase, and to purchase, such advertisements in excess of 10,000 lines in a combination of the Times-Picayune and the States.

The defendant corporation issued a new general rate card effective February 1, 1950, requiring general advertisers to contract to purchase general advertising in the Times-Picayune (daily only), and in the States (daily only), as a unit at combination rates, and refusing to sell such advertising in each newspaper separately.

At that time, profits in the Times-Picayune, before general and administrative expenses, were increasing while those in the States were decreasing.

The purpose of the defendants in adopting the unit rate on all general advertising is illustrated by a memorandum prepared by the national advertising representative of the defendant corporation, V. J. Kelley, and sent by him to his various branch offices. This memorandum was written on November 26, 1949, after Kelley had attended conferences with representatives of the defendant corporation, including defendants Nicholson and Tims, at which the adoption of the unit rate was agreed upon. Copies of the memorandum were sent to Mr. Tims and to Mr. Ladreyt.

In his memorandum, after stressing the favorable position occupied by the Times-Picayune and the States, with respect to circulation coverage of the New Orleans market, Mr. Kelley stated:

> "We anticipate that a relatively few accounts which have formerly used the Times-Picayune exclusively or the other evening paper in conjunction, may endeavor to prevent the 'old order changeth.' In those cases be firm. The policy has been set * * *"

and further:

> "Last, but not least, this single unit plan out to eliminate to a great extent the deleterious selling on the part of our evening contemporary, which, in the long run, is not to the best interests of the manufacturer."

During his testimony, in reply to a question, Mr. Kelley stated that it was true in a number of cases that the advertising agencies favored the compulsory or unit rate, because once an agency had made its selection or its recommendation of media to the advertiser, the agency could resist any pressure brought to make a change in media by pointing to the unit rate as making such change impossible.

The unit rate on general advertising resulted in an increase of more than 30% in 1950 over 1949 in such lineage in the States. Some accounts which had used the Times-Picayune exclusively, or some other paper in conjunction therewith, objected to the imposition of the forced combination. Seventeen national advertisers or advertising agents testified at the trial concerning the effect on their advertising of the unit rate. National advertising expenditures are budgeted, and only a limited amount is placed in newspapers in any one city. A great number of advertisers use only one morning and one afternoon newspaper, and some advertisers completely abandoned use of the daily Item, while others reduced their lineage in that newspaper, as a result of the forced unit rate on general advertising. Some adver-

tisers increased their general advertising lineage in the States, or added the States to their schedule involuntarily as a result of the unit rate.

During the four years preceding the introduction of the unit rate the Times-Picayune carried in excess of 50% more general display advertising than the States of the Item. Following the establishment of the forced unit rate, general display lineage carried by the States rose sharply. Within several months, after unexpired contracts had been completed, the lineage of the States equalled that of the Times-Picayune. In the meantime, such lineage in the Item showed a slight gain. It is impossible, of course, to state with any degree of precision what portion of the increased lineage enjoyed by the States would have gone to the Item but for the forced unit rate. However, it is clear that some general advertisers bought space in the States which they would not have purchased in either afternoon paper, while others bought space in the States which they would have purchased in the Item absent the forced unit rate. It is clear, too, that the States secured a commanding lead over the Item in the general display field after it had the advantage of the unit rate, and not until then.

Local Display Advertising

Since 1935, the defendant corporation in connection with contracts for display advertising has provided that any advertiser contracting for lineage in the Times-Picayune would be billed for any advertising in the States during the period of the contract, at the States rates, but based upon the lineage contracted for in the Times-Picayune. From 1938 to 1946 the defendant corporation offered retail advertisers a reduction of one cent a line on all advertising carried in both the Times-Picayune and the States, provided identical copy was placed in each newspaper. In 1946, the one cent reduction was abandoned, but the offer of a reduced rate to States advertisers, based upon the amount of lineage contracted for in the Times-Picayune, was continued. The effect of these inducements doubtless was to draw some advertising from the Item to the States.

News Vendors.

The Item Company, in November 1949, announced plans to begin again publication of a Sunday newspaper, its Sunday edition having been suspended in 1941. Publishing, as they did at that time, the only Sunday newspaper in New Orleans, it goes without saying that this announcement caused concern to the defendants. It is in evidence that defendant corporation's Manager of General Advertising wrote a letter in January, 1950, in which he stated:

> "In our opinion, there is no necessity for another Sunday paper in New Orleans, and the plan of the Item to enter the Sunday field beginning March 5th is not economic from the standpoint of the reader and the advertiser, and we consider their doing so an infringement on a franchise which we believe belongs to us."

The Government contended that defendants sought to hinder the Item in distributing its Sunday newspapers by warning the defendant corporation's news vendors that if they handled the Sunday Item they would not be permitted to handle the evening States. Defendants, on the other hand, asserted that certain vendors who sold both the States and the Item had not been according to the former fair and equal treatment in sales and distribution, and that such vendors had been given the alternatives of according both newspapers the same treatment or ceasing the sale of one or the other. I think the evidence bears out defendants. The so-called Sunday edition of the Item can scarcely be termed a Sunday newspaper. It is true that it contains comics and feature sections which do not appear in the week-day editions. The Item publishes no Saturday edition under that name, but the Sunday edition is printed from approximately 9 o'clock A.M. to 4 o'clock P.M. each Saturday and bears the dateline of the succeeding Sunday. Only on rare occasions are special editions containing late Saturday afternoon news put out. Thus, the Item appears on the newsstands on Saturdays, along with the States, and is in competition with the States all day Saturday, until late afternoon or early evening, when the first edition of the

Times-Picayune appears. The defendants were entirely within their rights in requiring a choice of the offered alternatives.

The Contention of the Government That the Defendants Operated the Evening States at a Loss

Considerable evidence was offered by the Government in an effort to establish that the defendants maintained a rate structure which, considered as a whole, resulted in the operations of the evening States at a loss. The defendant corporation's net profit from its operations during 1948 and 1949 averaged more than $2,000,000.00, but the Government contended that during this period and into 1950 the States was operating at a loss. The Company's records carried a break-down of revenues and expenses as between the Times-Picayune, morning and Sunday, as a unit, and the States as a unit. Allocations were made of revenues, advertising and circulation, as between the two papers. Allocations were also made of most of the expense items. The Government contended, however, that in certain departments expenses were only partially allocated, or not allocated at all. On the books of the corporation, the States showed substantial profits for the years 1947 through 1950. It is conceded by defendants that the defendant corporation solely for the convenience of its management made allocations as between the two newspapers on an arbitrary basis of "80-20", 80% of the expenses being allocated to the Times-Picayune, morning and Sunday, and 20% to the States, evening.

In reports to the management of the defendant corporation, its auditing firm, Haskins and Sells, referred to the method of allocating expenses followed by the defendant corporation, and suggested that if it were desired that the Company's records reflect separately the net income of the Times-Picayune and the New Orleans States, consideration be given by the management to the advisability of a study to determine the basis of proper allocation of all operating expenses. The resident partner of Haskins and Sells testified, however, that his firm had no reason to believe that any basis of allocation resulting from such a study would disclose that the States was operating at a loss.

The Government's chief complaint was that certain expense items were not allocated as between the defendant corporation's two newspapers, but were charged to the corporation generally. The evidence shows that not only did the corporation not allocate certain expenses but that in determining profits the Company did not allocate many items of general income, such as interest on investments, dividends on stock, profits from sale of capital assets, etc. The management was satisfied with the method of allocation employed, and was interested in the net result of the defendant corporation's operations. I find nothing in the evidence which would indicate, much less establish, that the States at any time was operated at a loss.

Applicability of the Sherman Act

I am convinced that the defendants, except defendant Donald W. Coleman, who had no connection with the adoption or enforcement of the unit rule, have violated Section 1 of the Sherman Act. Publishing, as it does, two separate and distinct newspapers, the defendant corporation's general and classified advertising contracts which compel an advertiser in one of its newspapers to contract for an equal amount of space in its other newspaper, effect tying-in sales. With respect to such sales, the Supreme Court in Standard Oil Company (Calif.) vs. United States, 337 U.S. 293, 305-6 (1949), said:

> "Tying agreements serve hardly any purpose beyond the suppression of competition * * *. In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one. See Miller, Unfair Competition, 199 et seq. (1941); Note, 49 Col. L. Rev. 241, 246 (1949). The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also".

The corporation is able to enforce the unit rate only because of the dominant position which the Times-Picayune, the tying product, occupies in New Orleans and in the New Orleans trading area. The Times-Picayune, because of its monopoly position, has been able to force buyers of advertising space to purchase what they do not want, space in the States, in order to obtain what they require, space in the Times-Picayune. The very fact that the defendant corporation was able successfully to impose the unit rate on general and classified advertising tends to prove the monopoly position which the Times-Picayune enjoys. In the case of *United States* vs. *Pullman Company*, 50 F. Supp., 123, 132, in speaking of certain practices of the defendant, the court said:

> "They do tend to show that a concern which is able to impose such conditions has a monopolistic control of its market, and that whatever concession its customers obtain becomes a matter of grace from the monopolist, and not from the pressure of free competition."

It is doubtless true as defendants contended that one reason for the establishment of the unit rate was to increase the revenue of the defendant corporation. However, it is apparent from the record that it was also the intention of the defendants, except the defendant Coleman, to restrain general and classified advertisers from making untrammelled choice between the afternoon newspapers in purchasing advertising space, and also to substantially diminish the competitive vigor of the Item, the States' only competitor in the afternoon field. As one defendant put it, one purpose of the rate was to "attempt to slow the Item down."

Section 1 of the Sherman Act condemns contracts in restraint of trade, as well as combinations and conspiracies. Restraint of trade, as that term is used in Section 1 of the Act, includes restraint of competition. In *Paramount Famous Corporation* vs. *United States*, 282 U. S. 30; 43 (1930), the Court said:

> "Congress has so legislated as to prevent resort to practices which unduly restrain competition, or unduly

obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. Eastern States Lumber Assn. vs. United States, supra (234 U. S. 600 (1912) 613)."

Contracts or combinations which foreclose competitors from a substantial market or from a substantial part of a market restrain trade within the meaning of the Sherman Act. The Sherman Act condemns the foreclosure of competitors. In *United States* vs. *General Motors Corporation*, 121 F. 2d 376, 403 (C.C.A. 7, 1941) cert. denied 314 U. S. 618, 1941, the court said:

". . . the theory in back of the Sherman law is to protect the free movement of goods in interstate commerce against unreasonable restraints, to assure open interstate markets where traders may freely negotiate sales, and to preserve the normal competitive forces which otherwise might operate in these markets."

The defendants contended that the establishment of the unit rate on classified and general advertising was a customary and legitimate method of increasing the defendant corporation's revenue. They contended that any restraint which may have resulted was that which normally and inevitably occurs whenever one competitor takes business from another, and that consequently the restraint, if any, was not unreasonable within the intendment of the Statute.

With respect to ascertaining the standard by which it is to be determined what restraints are reasonable and what are unreasonable, the Court in *United States* vs. *Trenton Potteries*, 273 U. S. 392, 397 (1927), said:

"Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the

> light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."

Thus it will be seen that the effect of the restraint on competition is the important question in determining reasonableness. For the restraint to be unreasonable it is not necessary that it eliminate all or substantially all competition. If this were not true, only total monopolization would be unlawful under the Act.

The evidence discloses that a substantial portion of the market is restrained by the unit rule. It was shown that defendant corporation's general advertising contracts affect 58% of all general advertisers in the New Orleans market. This includes those general advertisers who in 1949 used the morning and one of the two evening newspapers (33.4%), the Times-Picayune (22.7%), and the States only (2%). Breaking the figures down further, it is found that 23.7% used the Times-Picayune and the States in 1949. Although these advertisers selected the Times-Picayune and the States voluntarily before the adoption of the unit rate, they should be included in ascertaining the effect of the rate, for the reason that although in the past they may have used both the Times-Picayune and the States, it does not necessarily follow that they will continue to prefer the States over the Item. But even disregarding this 23.7% of advertisers, there would still remain approximately 35% of all advertising accounts in 1949 in New Orleans newspapers which were affected by the adoption of the unit rate on general advertising. This can hardly be termed insubstantial.

I think it clear that the Supreme Court has not limited its condemnation of tying clauses to sales tying an unpatented to a patented product. In the *Standard Oil* Case, *supra*, it will be noted that the court stated:

". . . . in the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract, and only his control of the supply of tying device, whether conferred by patent monopoly or otherwise obtained could induce a buyer to enter one" (Emphasis supplied).

In the case of *United States* v. *Griffith*, 334 U. S. 100, 107 (1948), a case which did not involve patents or copyrights, the Court said:

"A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors."

It is thoroughly settled that the businesses of the defendant corporation and its competitor form a part of interstate commerce. In *Lorain Journal Co.* v. *United States*, 72 S. Ct. 181, 185, the Court said:

"There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce. Associated Press v. United States, 326 U. S. 1, 14, 65 S. Ct. 1416, 1421, 89 L. Ed. 2013; Associated Press v. National Labor Relations Board, 301 U. S. 103, 57 S. Ct. 650, 81 L. Ed. 953. The same is true of national advertising originating throughout the nation and offering products for sale on a national scale. The local dissemination of such news and advertising requires continuous interstate transmission of materials and payments, to say nothing of the interstate commerce involved in the sale and delivery of products sold. . . ."

The Attempt to Monopolize

The Government contended that the defendants have used the dominant position of the Times-Picayune to exclude competition from a substantial part of the market involved

in the publication and circulation of newspapers in New Orleans, and that defendants' attempt to monopolize has consisted of both the intent to exclude and the actual exclusion of their competitor, the Item, from a substantial part of this market.

The Government in this connection contended that the intent and the effect have been shown by (1) their purchase of the competing States in 1933; (2) their adoption of the unit rate for classified advertising in 1935; (3) their operation of the States, evening, at a loss since 1948, while making profits from the operations of the Times-Picayune, morning and Sunday; (4) their adoption of the unit rate on general advertising; (5) their interference with distribution of their remaining competitor's newspapers for 1949-50. I reject the Government's contentions with respect to the defendant corporation's purchase of the competing States in 1944; the alleged operation of the States, evening, at a loss since 1948, and the interference with distribution of defendants' competitor's newspapers in 1949 and 1950. No inferences that may reasonably be drawn from the evidence support those contentions. The Government has utterly failed to prove that the purchase of the States in 1933 was a part of a course of conduct which had as its purpose an attempt to monopolize. The sale of the States was broached by the Ewing family, its then owners. The terms of the sale, from which the Government seeks to have the Court draw inferences of unlawful intent, were legal and customary. It was only natural that defendants, intelligent and experienced business men that they are, would seek to protect themselves by conditions such as are found in their contract with the States' owners. Of course, legal means may sometimes be used to attain illegal ends, but that was not the case with respect to the purchase of the States.

The Government's contentions regarding the operation of the States at a loss, and the interference with the Item's news vendors have already been discussed, and no purpose will be served by repeating those discussions. It is sufficient here to say that the evidence convinces me that the States was not operated at a loss, and that the so-called

interference with the Item's news vendors formed no part of an attempt by the defendants to monopolize.

I am satisfied that the evidence with respect to the exaction of the unit rate for classified advertising and general advertising, and the effects thereof, establishes a violation of Section 2 of the Act by all of the defendants except the defendant Donald W. Coleman.

In *American Tobacco Co.* v. *United States*, 66 S. Ct., 1125 (1946) the Court approved a charge of the district court which stated:

> "Now the term 'monopolize' in the phrase 'attempt to monopolize' means the employment of methods, means, and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approached so close as to create dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment.",

and the Court stated:

> "To support the verdicts it was not necessary to show power and intent to exclude all competitors, or to show a conspiracy to exclude all competitors. The requirement stated to the jury and continued in the statute was only that the offenders shall 'monopolize any part of the trade or commerce among the several States, or with foreign nations.'"

Defendants, other than Coleman, by the use of the unit rate device, attempted to monopolize that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space and who could not because of budgetary limitations or financial inability purchase space in both afternoon newspapers. This was clearly an attempt to monopolize a part of trade or commerce among the several states, within the meaning of the Statute.

In *Lorain Journal Co. v. United States, supra,* the Court said:

> "To establish this violation of § 2 as charged, it was not necessary to show that success rewarded appellants' attempt to monopolize. The injunctive relief under § 4 sought to forestall that success. While appellants' attempt to monopolize did succeed insofar as it deprived WEOL of income, WEOL has not yet been eliminated. The injunction may save it. '(W)hen that intent (to monopolize) and the consequent dangerous probability exist, this statute (the Sherman Act), like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.' Swift & Co. vs. United States, 196 U. S. 375, 396, 25 S. Ct. 276, 279, 49 L. Ed. 518. See also, American Tobacco Co. v. United States, 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575; United States v. Aluminum Co., 2 Cir., 148 F. 2d. 416, 431."

And in the *American Tobacco Company* Case, *supra,* the Court said:

> "In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. U. S. v. Aluminum Co. of America, 2 Cir., 148 F. 2d. 416."

The Government is entitled to relief as against all of the defendants except Donald W. Coleman, and the suit will be dismissed as to him.

Findings of fact and conclusions of law will be submitted in accordance with Rule 2(d) of this Court; and the Government will submit a proposed form of decree.

New Orleans, Louisiana, May 27th, 1952.

(Sgd.) HERBERT W. CHRISTENBERRY,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Civil Action No. 2797

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE TIMES-PICAYUNE PUBLISHING COMPANY, L. K. NICHOLSON, JOHN F. TIMS, JR., AUBREY F. MURRAY, and DONALD W. COLEMAN, *Defendants*

FINDINGS OF FACT—Filed July 1, 1952

1. Each of the individual defendants is an inhabitant of the New Orleans Division of the Eastern District of Louisiana.

2. Defendant The Times-Picayune Publishing Company is a corporation organized under and existing by virtue of the laws of the State of Louisiana. It transacts and has its only place of business in the city of New Orleans, Louisiana, within the New Orleans Division of the Eastern District of Louisiana.

3. Defendant L. K. Nicholson at all times from early in the year 1935 to date has been the President of The Times-Picayune Publishing Company.

4. Defendant John F. Tims, Jr. is First Vice-President and has been since 1923 General Manager of The Times-Picayune Publishing Company.

5. Defendant Aubrey F. Murray has been Advertising Director of The Times-Picayune Publishing Company since 1933 or 1934.

6. Defendant Donald W. Coleman is Fifth Vice-President and has been during the past fifteen years Circulation Manager of The Times-Picayune Publishing Company.

7. The Times-Picayune Publishing Company (hereinafter called the defendant corporation) has published in New Orleans, continuously since prior to 1933, a morning and Sunday newspaper (the daily morning editions having been known as the Times-Picayune, and the Sunday editions

having been known since 1933 as the Times-Picayune-New Orleans States) which is in general circulation in the city of New Orleans, and elsewhere in the State of Louisiana, and in other states of the United States. During the period from July 1941 until March 1950, the Company published and distributed and sold the only Sunday newspaper published in New Orleans.

8. The Times-Picayune, morning, New Orleans States, evening, and The Times-Picayune-New Orleans States, Sunday, are printed at and distributed from the building of The Times-Picayune Publishing Company in the City of New Orleans, where that company owns, maintains and operates printing presses, linotypes and all other equipment necessary to the printing and circulation of newspapers. The majority of the officers, department heads, mechanical superintendents, pressmen and other employees of the Publishing Company devote their time to the printing, publication and circulation of both of said newspapers, and for such purpose the offices, other space and presses and virtually all equipment are used on both papers.

9. A newspaper known as The New Orleans States was published prior to 1933 as an evening newspaper by The Daily States Publishing Company, Ltd. On July 17, 1933, the defendant corporation purchased from the Daily States Publishing Company, Ltd., the name, good will and circulation of The New Orleans States (hereinafter called the States), its contracts with advertisers, and also its contracts and rights to be furnished news, features, and comics. The contract of purchase provided that the vendors would not engage in the newspaper publishing business in the New Orleans area for a period of ten years thereafter; that the vendors would not for a period of nine months thereafter sell any part of their machinery or equipment to any purchaser located in the New Orleans area, and that in any sale of any part of the machinery or equipment to any person, there should be included an agreement on the part of said person that the machinery or equipment would not be used by it or its assigns in the New Orleans area within nine months from the date of the contract; and that the vendors for a period of nine months would not sell any part of the machinery or equipment without first offering

it to the defendant corporation. Since said purchase, the defendant corporation has published the States as an evening newspaper of general circulation in New Orleans and elsewhere in the State of Louisiana, and in other states of the United States. The purchase of the States in 1933 was not a part of a course of conduct which had as its purpose an attempt to monopolize.

10. At no time did The Times-Picayune Publishing Company operate the New Orleans States at a *financial* loss. At no time did any of the defendants or any of the officers or agents of the Publishing Company devise, execute or carry out any plan or scheme whereby losses in the New Orleans States, through the sale of advertising at low rates, would be absorbed by profits derived by The Times-Picayune Publishing Company in the publication of its morning newspaper.

11. The circulation practices of the defendants in connection with news vendors formed no part of any plan or scheme to injure or restrain any competitor.

12. The Times-Picayune (morning and Sunday) and the States (evening) are published by the defendant corporation as two separate and distinct newspapers. These newspapers reach separate groups of readers; are produced, in part, by separate organizations; have separate news, feature and editorial content, have an entirely different and distinctive make-up and appearance, and have been treated as separate newspapers by the defendants.

13. The New Orleans Item (hereinafter called the Item) is a newspaper of general circulation, published by The Item Company in the evening, Monday through Friday, with a Sunday issue which comes out on Saturday. The Item competes with the newspapers published by the defendant corporation. It is published in New Orleans, and is in general circulation in New Orleans and elsewhere in the State of Louisiana and in other states of the United States. The Item appears on the newsstands on Saturdays, along with the States, and is in competition with the States all day Saturday, until late afternoon or early evening, when the first edition of the Times-Picayune appears.

14. The Times-Picayune, States, and Item are the only significant newspaper media published in New Orleans for

the dissemination of news, advertising, and other information to residents of New Orleans.

15. The Times-Picayune is the dominant newspaper of New Orleans and its trading territory. It is the only morning newspaper of general daily circulation published in New Orleans and there are no other daily morning newspapers circulated in New Orleans which compete with it for local and national advertising in the morning field. In each of the years 1949 and 1950 its circulation was equal to the combined circulation of both the States and the Item. For at least twenty years, the Times-Picayune has been the largest newspaper in New Orleans in circulation, advertising lineage, and number of pages published.

16. The newspaper publishing field in New Orleans is open to anyone desiring to engage in the newspaper publishing business in the City of New Orleans. There are features, news services, editorial assistance, labor and supplies available for the operation of competing newspapers in addition to those already engaged in the business within the City of New Orleans.

17. Newspaper advertisers who desire to cover the New Orleans market must of necessity use the Times-Picayune as a medium for their advertising.

18. Advertising in New Orleans newspapers is commonly divided into three principal categories, namely: classified, general (sometimes called national), and local display (sometimes called retail).

19. The defendant corporation at all times since March, 1935, has required advertisers using classified advertisements to agree to purchase, and to purchase, such advertisements in the Times-Picayune and the States as a unit, at unit or combination rates, and has refused to sell such advertising in the morning or evening newspapers separately, except for advertising from a small area across the river from New Orleans, known as "over-the-river" classified advertising. The "over-the-river" classified advertising represents such a very small part of the total classified as to be relatively unimportant.

20. In 1924 the Morning Tribune, published as a morning paper, and The Item, published as an evening paper by The Item Company, Ltd., established unit combination

rates for classified advertising and continued such rates in effect until 1941 when the publication of the Morning Tribune was discontinued. At the time that The Times-Picayune Publishing Company adopted the unit rate structure for classified advertising in 1935, a large number of other publishing companies, publishing morning and evening newspapers, had such a rate structure on classified advertising.

21. In 1934, one year prior to the adoption of the unit rate on classified advertising, and while the States was under the ownership of the defendant corporation, the States carried less than one-half the number of lines of such advertising carried by the Times-Picayune. By 1936, after one year of the unit rate, the classified lineage of the States had risen to a par with that of the Times-Picayune. This result was inevitable, since in order to obtain lineage in the Times-Picyaune it was necessary for a classified advertiser to take a similar amount of lineage in the States. During the ensuing fifteen years, up to and including 1950, the spread between the lineage in each of the two newspapers, and that of the Item, steadily increased. In 1950, classified advertising lineage carried by the Times-Picayune and by the States approximated four and one-half million lines each, or more than double the lines carried by the Item. In 1934 the States carried 35% of the classified advertising lineage in the evening field. By 1950 it carried 68% of such lineage.

22. A major portion of this increase in lineage in the States resulted from the use of the compulsory unit rate. Since the adoption of the compulsory unit rate many classified advertisers are required by the defendant corporation to purchase space in the States which they do not want. Some of these classified advertisers would place advertising in the Item except for the compulsory unit rate.

23. From 1933 to 1940, general advertisers were afforded an opportunity to purchase advertising space in the Times-Picayune and the States separately, but were given the benefit of an optional combination or unit rate for advertisements carried in both papers, the combination rate being lower than the sum of the individual rates for each newspapers.

24. A new unit rate for national advertising was adopted by the defendant corporation on June 1, 1940. It was optional and continued in effect, with some changes in details, for ten years. Under this arrangement, the defendant corporation required advertisers, in order to obtain a reduced rate on general advertising in excess of 10,000 lines in its daily papers, to contract to purchase, and to purchase, such advertisements in excess of 10,000 lines in both the Times-Picayune and the States, or in a combination of either the Times-Picayune or the States with the Times-Picayune-New Orleans States.

25. The defendant corporation issued a new general rate card effective February 1, 1950, in which it required general advertisers to purchase general advertising in the Times-Picayune (daily only), and in the States (daily only), as a unit at combination rates, and refused to sell such advertising in each newspaper separately. The rate card also provided that general advertising could be purchased in combination of morning and Sunday or evening and Sunday. At that time, profits from the Times-Picayune, before general and administrative expenses, were increasing while those from the States were decreasing.

26. At the time that The Times-Picayune Publishing Company announced the unit rate on general advertising in 1949, approximately 180 publishers, constituting the vast majority of the publishers publishing morning and evening newspapers, were using unit combination rates.

27. The successful operation of newspapers requires that the revenue derived from their advertising and circulation (accounting for approximately 98 per cent of the total revenues of newspapers in New Orleans) be compensatory. To receive general advertising for its two papers defendants compete to some extent with other newspapers and other national advertising media, including radio, television, magazines, billboards, etc., in New Orleans and elsewhere.

28. The unit rate on general advertising resulted in an increase of more than 30% in 1950 over 1949 in such lineage in the States. During the four years preceding the introduction of the unit rate the Times-Picayune carried in excess of 50% more general display advertising than

the States or the Item. Following the establishment of the forced unit rate, general display lineage carried by the States rose sharply. Within several months, after unexpired contracts had been completed, the lineage of the States equalled that of the Times-Picayune. In the meantime, such lineage in the Item showed a slight gain. The States secured a commanding lead over the Item in the general display field after it had the advantage of the unit rate, and not until then.

29. National advertising expenditures are budgeted, and only a limited amount is placed in newspapers in any one city. A great number of advertisers use only one morning and one afternoon newspaper, and some advertisers completely abandoned use of the daily Item, while others reduced their lineage in that newspaper, as a result of the forced unit rate on general advertising. Some advertisers increased their general advertising lineage in the States, or added the States to their schedule involuntarily as a result of the unit rate. Some general advertisers bought space in the States which they would not have purchased in either afternoon paper, while others bought space in the States which they would have purchased in the Item absent the forced unit rate.

30. The defendant corporation's general advertising contracts now in use affect 58% of all general advertisers in the New Orleans market. This is a substantial portion of the market. It includes those general advertisers who in 1949 used the morning and one of the two evening newspapers (33.4%), the Times-Picayune only (22.7%), and the States only (2%).

31. The intention of the defendants (except the defendant Coleman) in adopting the forced unit rates on all general and classified advertising was to restrain general and classified advertisers from making an untrammeled choice between the States and the Item in purchasing advertising space, and also to substantially diminish the competitive vigor of the Item. The Times-Picayune Publishing Company is able to enforce the unit rate only because of the dominant position which the Times-Picayune, the tying product, occupies in New Orleans and the New Orleans trading area.

32. Since 1935, the defendant corporation in connection with contracts for local display advertising has provided that any advertiser contracting for lineage in the Times-Picayune would be billed for any advertising in the States during the period of contract at the States rates, but based upon the lineage contracted for in the Times-Picayune. From 1938 to 1946 the defendant Corporation offered retail advertisers a reduction of one cent a line on all advertising carried in both the Times-Picayune and the States, provided the identical copy was placed in each newspaper. In 1946, the one-cent reduction was abandoned, but the offer of a reduced rate to States advertisers, based upon the amount of lineage contracted for in the Times-Picayune, was continued. The effect of these inducements was to draw some advertising from the Item to the States. At least since 1950 an advertiser contracting for lineage in the New Orleans States was allowed to purchase advertising in the Times-Picayune at rates for the Times-Picayune equivalent to the contract rate for the New Orleans States plus one cent per line.

33. A substantial amount of news, features, comics, cartoons, syndicated columns, and other information is gathered from all parts of the United States and other countries, and is distributed and delivered by various means in interstate and foreign commerce to the publishers of the Times-Picayune, the States and the Item in New Orleans, Louisiana. These newspapers distribute and disseminate this news and other information to persons in New Orleans, elsewhere in the State of Louisiana, and also to persons outside the State by truck, airplane, railroads and the United States mail.

34. The daily and Sunday average circulation before adjustments in 1950 in Louisiana and outside Louisiana for the newspapers published in New Orleans are:

	In Louisiana	In States other than Louisiana
Times-Picayune (morning)	169,147	19,255
States (evening)	99,131	6,104
Item (evening)	108,256	6,404
Times-Picayune-States (Sunday)	245,496	41,982
Item (Sunday)	88,156	13,371

35. The defendant corporation, in arranging for advertisements in its newspapers, causes a continuous flow in interstate commerce of substantial amounts of advertising copy, mats, cuts, contracts and checks between the advertiser and the newspaper publisher. The same is true as to The Item Company. The newspapers published by The Times-Picayune Publishing Company and The Item Company distribute and disseminate such advertising to persons in New Orleans and elsewhere in Louisiana, and also to persons outside the State.

36. Substantial amounts of newsprint paper, ink and other materials are manufactured in various places in the United States and foreign countries and are shipped in interstate commerce to The Times-Picayune Publishing Company and The Item Company for use in the publication of their newspapers.

37. Newspaper advertising is essential, or at least helpful, in developing, maintaining and extending a market for the sale of goods and services. A large variety and substantial amounts of goods and services produced and distributed by persons located in the various states of the United States, other than Louisiana, are advertised and offered for sale in Louisiana by means of advertisments published in the Times-Picayune, the States and the Item. Sales of such products and services are made in interstate commerce to purchasers in New Orleans and vicinity as a result of advertisements published in these newspapers, and sales of other such products and services are made in interstate commerce to purchasers in states other than the State of Louisiana as a result of advertisements in these newspapers by advertisers located in New Orleans.

38. The defendant L. K. Nicholson determines the operating policies of the defendant corporation and supervises the whole company operation. He personally participated in the conferences leading up to the adoption of the unit rate for general advertising.

39. The defendant John F. Tims, Jr. confers with defendant Nicholson in the determination of operating policies and assists him in the general supervision of business of the defendant corporation. Defendant Tims prepared the general rate card which adopted the unit rate for general

advertising in 1950 and attended the conferences leading up to its adoption.

40. The defendant Aubrey F. Murray supervises all the advertising departments of the defendant corporation and was consulted by the defendant Tims in the preparation of the general advertising rate cards.

41. Defendant Donald W. Coleman had no connection with the adoption or the enforcement of the unit rates.

Dated: July 1, 1952.

(S.) HERBERT W. CHRISTENBERRY,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Civil Action No. 2797

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE TIMES-PICAYUNE PUBLISHING COMPANY, L. K. NICHOLSON, JOHN F. TIMS, JR., AUBREY F. MURRAY, and DONALD W. COLEMAN, *Defendants*

CONCLUSIONS OF LAW—Filed July 1, 1952

1. The Court has jurisdiction of the subject matter hereof and of each of the defendants, and the complaint states a cause of action against the defendants, except the defendant Coleman, under the provisions of the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended, commonly known as the Sherman Act.

2. The general and classified advertising contracts of the defendant The Times-Picayune Publishing Company imposing compulsory unit rates have been and now are in unreasonable restraint of trade and commerce among the several states.

3. The defendant The Times-Picayune Publishing Company has violated and is now violating Section 1 of the Sherman Act by entering into and adhering to the foresaid contracts.

4. The defendants L. K. Nicholson, John F. Tims, Jr. and Aubrey F. Murray have violated and are now violating Section 1 of the Sherman Act by forming and effectuating, for and on behalf of the defendant The Times-Picayune Publishing Company, the aforesaid contracts.

5. The defendant The Times-Picayune Publishing Company has violated and is now violating Section 2 of the Sherman Act by engaging in an attempt to monopolize a part of the trade and commerce among the several states.

6. The defendants L. K. Nicholson, John F. Tims, Jr. and Aubrey F. Murray have violated and are now violating Section 2 of the Sherman Act by forming and effectuating for and on behalf of the defendant The Times-Picayune Publishing Company the aforesaid contracts.

7. Defendant Donald W. Coleman has not participated in the aforesaid violations of Section 1 or Section 2 of the Sherman Act.

Dated: July 1, 1952.

(S.) HERBERT W. CHRISTENBERRY,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Civil Action No. 2797

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE TIMES-PICAYUNE PUBLISHING COMPANY, L. K. NICHOLSON, JOHN F. TIMS, JR., AUBREY F. MURRAY, and DONALD W. COLEMAN, *Defendants*.

FINAL JUDGMENT—Filed July 1, 1952

Plaintiff, United States of America, filed its complaint on June 14, 1950. The defendants filed their answers to said

complaint on September 27, 1950. This cause came on for trial April 30, 1951, and trial was completed May 17, 1951, and final arguments were heard on July 12, 1951. The Court filed its opinion May 27, 1952, and on July 1, 1952, filed its findings of fact and conclusions of law, finding and adjudging the defendants, except defendant Donald W. Coleman, to have violated Sections 1 and 2 of the Sherman Act.

Now Therefore, it is hereby Ordered, Adjudged and Decreed as follows:

I

Defendant Donald W. Coleman has not participated in the Violation of Section 1 or Section 2 of the Sherman Act as alleged in the complaint, and the complaint be and is hereby dismissed as to Donald W. Coleman.

II

This judgment shall go into effect thirty (30) days from the date it becomes final.

III

The provisions of this final judgment applicable to the defendant, The Times-Picayune Publishing Company, shall apply to such defendant, its officers, agents, servants, employees, attorneys, subsidiaries, successors, and assigns, and to any other person, firm, or corporation acting or claiming to act through, under the control of, or for such defendant.

IV

A. The general and the classified advertising contracts of the defendant, The Times-Picayune Publishing Company, imposing compulsory unit rates have been and now are in unreasonable restraint of trade and commerce among the several states in violation of Section 1 of the Act of Congress of July 2, 1890, 26 Stat. 209, 15 U. S. C. Sec. 1, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and commonly known as the Sherman Act.

B. The defendant, The Times-Picayune Publishing Company, has violated and is now violating Section 1 of the

Sherman Act by entering into and adhering to the aforesaid advertising contracts.

C. The defendant, The Times-Picayune Publishing Company, has violated and is now violating Section 2 of the Sherman Act by engaging in an attempt to monopolize a part of trade and commerce among the several states.

V

Defendant, The Times-Picayune Publishing Company, is enjoined and restrained from, directly or indirectly:

A. Offering to sell, contracting to sell, or selling advertising space in any newspaper published by it only upon the condition, expressed or implied, that the purchaser of such space will contract for or purchase advertising space in any other newspaper published by it.

B. Refusing to contract to sell or refusing to sell advertising space separately in each newspaper published by said defendant.

C. Using the dominant position of the defendant, The Times-Picayune Publishing Company, in th morning field, to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans;

Provided that the rates for the sale of general, classified and local display newspaper advertising initially adopted by the defendant, The Times-Picayune Publishing Company, after this judgment becomes final, shall with due notice to the office of the Attorney General be presented by said defendant to this Court for approval under the terms of this Section V of this Final Judgment, and subsequent rate cards may thereafter be presented for approval.

VI

Defendant The Times-Picayune Publishing Company is ordered and directed to:

A. Notify promptly all advertisers now carrying advertising space in any newspaper published by it that it will

contract to sell and sell advertising space in any of its newspapers at rates, terms, and conditions in compliance with Section V of this final judgment.

B. Advise promptly in writing all officers, advertising agents, advertising solicitors and all other employees in its advertising departments of the terms of this judgment and that each and every such person is subject to the provisions of this judgment; and it shall make readily available to such persons a copy of this final judgment and shall inform them of such availability.

VII

For the purpose of securing compliance with this judgment, and for no other purpose, any duly authorized representative or representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on notice to the defendant, The Times-Picayune Publishing Company, reasonable as to time and subject matter made to its principal office and subject to any legally recognized privilege, be permitted:

A. Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment;

B. Subject to the reasonable convenience of said defendant and without restraint or interference from defendants, to interview officers or employees of said defendant, who may have counsel present, regarding such matters;

Provided, however, that no information obtained by the means provided in this Section shall be divulged by the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party, or as otherwise required by law.

VIII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as

may be necessary or appropriate in relation to the construction of, or carrying out of this judgment, for the amendment or modification of any of the provisions thereof, or the enforcement of compliance therewith and for the punishment of violations thereof.

IX

Judgment is entered against the defendant, The Times-Picayune Publishing Company, for all costs to be taxed in this proceeding.

Dated: July 1, 1952.

(S.) HERBERT W. CHRISTENBERRY,
United States District Judge.